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No. 92-837

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

RAFEL LOPEZ, JR.,

Appellant,

vs.

HALE COUNTY, TEXAS; et al.,

Appellees,

On Appeal From The United States District Court For The Northern District Of Texas

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APPELLEE'S MOTION TO DISMISS OR AFFIRM

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APPELLEE'S MOTION TO DISMISS OR AFFIRM

INTRODUCTION

Hale County, Texas, by and through its Commissioners Court (Appellees) move to dismiss this appeal, or, in the alternative, to affirm the judgment of the United States District Court for the Northern District of Texas in this case. Supp. Ct.

R. 18.6. The reasons for dismissal of affirmance appear below.

Appellant greatly exaggerates the implications of the Three Judge District Court ruling. Section 5 courts have admittedly narrow jurisdiction, but when a Three Judge District Court is required to fashion an appropriate remedy, its judicial authority is certainly sufficient to vest the Order entered by the Three Judge District Court for the Northern District of Texas Order on September 1, 1992, with validity under the exigent circumstances which exist in the specific facts of this case. Denial of Appellant's pleadings will not work a fundamental change to the body of Voting Rights law, as alleged, but would instead place the opinion of the Northern District of Texas in line with earlier precedent which grants a Three Judge District Court ample authority to fashion a proper remedy in a Section 5 case. If Appellant's requested relief is granted, the Supreme Court would unduly and unnecessarily limit the authority of Section 5 Courts.

STATEMENT OF THE CASE

Appellees, acting in conformity with affirmative duties imposed by the Constitution and

Statutes of the United States, and of the State of Texas, engaged in an orderly process of reapportionment of Commissioners Court precincts and related election precincts, beginning in late 1990, and culminating with the adoption of a plan for the reapportionment of County Commissioners Precincts on September 11, 1991. This plan was formally submitted to the Department of Justice pursuant to 42 U.S.C. 1973c on October 23, 1991. The Commissioners Court requested expedited consideration of the submission, citing state deadlines regarding candidate qualification and voter certification, which commenced as early as December 3, 1991. Appellees' request for expedited consideration was ignored by the Department of Justice. Appellees submitted all materials required by Department of Justice regulations (28 CFR 51.27), but on the last available day of the 60 day review period, (December 30, 1991) the Department of Justice requested voluminous additional information. The request for additional information came 27 days after the date required by State law for the opening of the candidate filing period, (Article 172.023 Texas Election Code) and 24 days after State law requires the voter registrar in each county to issue voter certificates identifying the election precinct in which each voter is eligible to

cast his or her ballot. (Articles 13.142 and 14.01 Texas Election Code.) Of course, before the voter registrar can determine the election precinct in which each registered voter is eligible to vote, the political boundaries of the county must be known and finally approved, in turn necessitating a pre-cleared plan prior to the statutory implementation dates.

The Appellees's response to the Department of Justice request for additional information again contained a renewed request for expedited attention prior to February 19, 1992, the date early voting begins under State law. (Article 85.01, Texas Election Code.) Despite Appellees's repeated requests for expedited attention, the Department of Justice used the full extent of the second 60 day preclearance review period, and did not pose an objection to the Hale County plan until April 10, 1992, a full month after the March 10 primary elections. Litigation was instituted April 23, 1992, more than six weeks after the primary election.

Within the void created by the lack of preclearance prior to the March 10, 1992 primary, the Commissioners Court of Hale County, Texas, (acting in reliance upon advisory directives from the Texas Secretary of State and legal opinion of counsel indicated by the attached Appendix A,

incorporated herein by reference), determined that the primary elections should proceed under the proposed reapportionment plan, rather than the existing plan for county elections, in the belief that the previously existing plan was unconstitutional under the 14th Amendment, and in the good faith belief that the proposed plan would ultimately obtain preclearance. Upon receipt of the letter interposing objections to preclearance from the Department of Justice on April 10, 1992, Hale County requested, by way of a Freedom of Information Act Request, information upon which it might further evaluate the Department of Justice objection. This information was not received until July 14, 1992, further frustrating Appellees opportunity to evaluate its position relative to the objection posed by the Department of Justice in a timely manner.

On May 1, 1992, Appellees requested reconsideration of the March 30, 1992 objection by the Department of Justice. This request for reconsideration was not acted upon or rejected until July 8, 1992. On July 15, 1992, the parties agreed to a new reapportionment plan which would address the objection raised by the Department of Justice, and which satisfied Appellant that minority interests would be well served. (See Appendix B, attached hereto and incorporated herein by reference.) In

this regard, Appellant stipulated "That the 1992 elections should not be set aside at this time."

On July 23, 1992, the Three Judge District Court conducted a hearing pursuant to Appellant's Motion for Summary Judgment. The only issue before the Court, as agreed by the parties, was the issue an appropriate remedy. (See page 4, paragraph 4, Appellant's Jurisdictional Statement. Appellant now chooses to emphasize the lower court's adverse ruling on laches, but ignores the fact that an appropriate remedy was indeed fashioned by the three judge district court, i.e. approving use of the objected to plan for 1992 elections, and utilization of the agreed new reapportionment plan for 1994 and beyond.) On August 21, 1992, the new reapportionment plan was submitted to the Department of Justice in an effort to obtain preclearance of the plan. Preclearance was granted October 21, 1992. (Appendix C, attached hereto and incorporated herein by reference.)

On September 1, 1992, the three judge district court issued it's Order and Memorandum Opinion. Appellant seeks to reverse the Three Judge Court, and to obtain new elections in Commissioners Precincts 1 and 3 in special elections to be held, presumably, in 1993.

REASONS FOR DISMISSING THE APPEAL

THE APPEAL IS NOW MOOT, THE AGREED PLAN HAVING BEEN PRECLEARED IN ACCORDANCE WITH THE VOTING RIGHTS ACT FOR USE IN 1994.

Article III of the United States Constitution limits federal courts to the adjudication of actual controversies between litigants. Deakins v. Monaghan, 484 U.S. 193, 199 (1988). The mere presence of a disagreement, however sharp, is insufficient by itself to meet this constitutional requirement. Diamond v. Charles, 476 U.S. 54, 62 (1986). Mootness is part of the concept of justiciability, for the reason that federal courts are not empowered to decide questions that cannot affect the rights of litigants before them. DeFunis v. Odegaard, 417 U.S. 312, 316 (1974), (citing North Carolina v. Rice, 404 U.S. 244, 246 (1971). Because mootness destroys jurisdiction, the loss of jurisdiction during an appeal will result in dismissal. Tiverton Board of License Commissioners v. Pastore, 469 U.S. 238, 239 (1985). Thus, when the relief sought by a reversal would not change the status of the legal interests of the parties, no real

dispute exists, and the case is not justiciable. Flast v. Cohen, 392 U.S. 83, 95 (1968).

In the present case, the parties stipulated to an agreed plan for reapportionment of Hale County. This plan, at the time of the entry of the Judgment below, was pending preclearance. On October 21, 1992, the United States Department of Justice issued it's letter of preclearance. (Appendix B, attached hereto and incorporated herein by reference.)

Because the precleared plan creates a precinct with a majority of Hispanic population in Precinct 2, and reduces the percentage of Hispanic population in Precincts 1 and 3, the relief sought (vacating election results and ordering new elections in precinct 1 and 3) would not change the status of the legal interests claimed by Appellant. Watkins v. Mabus, 112 S.Ct. 412 (1991). Appellant does not identify any injury he will suffer if the relief sought is not granted. He does not claim, for example, that potential candidates who might have sought to qualify in the previously existing precincts 1 or 3 declined to do so because they knew that the apportionment plan used in the March and November elections lacked preclearance. NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 177 (1985), nor does Appellant claim that, as a Mexican-

American voter, his opportunity to be fairly represented would be improved by vacating elections and ordering new elections. Where the requested relief would not demonstrably benefit anyone and could result in prejudice to voters, candidates, and Appellees by overturning the results of an already conducted election, the Court should deny the appeal on grounds of mootness.

REASONS FOR AFFIRMING THE COURT BELOW

A. THE THREE JUDGE DISTRICT COURT PROPERLY EXERCISED ITS JURISDICTION AND DISCRETION TO FASHION AN APPROPRIATE REMEDY UNDER EXIGENT CIRCUMSTANCES.

Section 5 of the Voting Rights Act expressly reserves to the United States Department of Justice or the District Court for the District of Columbia exclusive authority to determine issues of "preclearance". Questions of enforcement by a three judge court are limited to:

1. Whether the jurisdiction is covered by Section 5;

2. whether the disputed state law is a "voting change";

3. whether preclearance has been obtained; and

4. if preclearance is required but has not been obtained, what is the appropriate remedy.

See McLain v. Lybrand, 465 U.S. 236 at 250, n. 17 (1984). There should be little doubt that the grant of authority to a Section 5 Three Judge District Court to fashion an "appropriate remedy" is vast, both in terms of express judicial authority, and in the broader area of equity. Appellant would ignore the great weight of case law to the contrary and seek to unduly and unnecessarily restrict the power of Section 5 Courts to fashion appropriate relief. Existing law vests the Three Judge District Court with ample jurisdiction to craft the appropriate relief necessary under the specific circumstances of a particular case. The breadth of precedent and the application of this judicial discretion is demonstrated by the following cases:

In United States v. Louisville Municipal Separate School District, 557 Fed. Supp. 1168 (N.D. Mississippi, 1983), a Three Judge District Court fashioned an appropriate remedy in a case involving

a run-off election scheme by making the relief "prospective" in nature, and held elections under a non-precleared plan effective rather than declare them void. "Voiding or even modifying past elections is a drastic remedy and should be applied only where absolutely necessary to vindicate, establish or protect important voting rights." In Louisville Municipal, supra, the Department of Justice was criticized for its failure to seek an injunction until just four days prior to the primary election, although it had notice of the objection four months prior to the disputed election. Additionally, the Court recognized that local officials had acted in good faith in their efforts to comply with court orders which placed them in jeopardy of violation of the Voting Rights Act. In the present case, the Department of Justice objection was not lodged until after the primary election despite repeated requests for expedited consideration by Appellees. Appellees reasonably believed that the initially proposed plan would receive preclearance, and began implementation of the uncleared plan only upon advice of Texas election administrators. (See Appendix A attached hereto).

In South Carolina v. United States, 585 Fed. Supp. 418 (District of Columbia, 1984), the State of

South Carolina adopted a plan for the reapportionment of its state senate. This plan was still pending preclearance when the candidate qualification period began. Holding that candidate qualification was "implementation" under the Voting Rights Act, the Court held that primary elections should be enjoined. "Eleventh hour" litigation to enjoin the election was only reluctantly sustained upon the basis that the state had been slow to promulgate a reapportionment plan. In contrast, the Appellees now before the Court moved forward with due diligence, but were prevented from obtaining a timely preclearance opinion by the lack of final census data and bureaucratic inertia, each beyond the control of Appellees.

In Terrazas v. Clements, 537 Fed. Supp. 514, (N.D. Texas, 1982), the Three Judge District Court recognized that under circumstances similar to those confronted by Appellees County in this litigation, the option of holding elections under existing boundaries was no longer tenable on constitutional grounds due to the large population disparities which had occurred during the intervening ten years. Faced with almost certain litigation and possible vacation of election results under the "old" lines in a 14th Amendment malaportionment claim or a Section 2 challenge, the

State of Texas sought judicial relief by approval of its uncleared "new" lines as "interim" boundaries. See Terrazas at page 524. The Terrazas opinion, supra, as does the South Carolina case, clearly identifies the limitations upon a Three Judge District Court in matters related to a determination of the merits or constitutionality of a plan which has not been precleared, but both cases indicate that in the area of "fashioning an appropriate remedy" the Three Judge District Court's discretion is very broad. (See Terrazas, page 526, n. 14).

In Georgia v. United States, 411 U.S. 526 (1973), the Supreme Court considered a direct appeal from a Three Judge District Court decision involving elections which were conducted without preclearance as a result of a stay Order. In that case, the Court held that it would be inequitable to require new elections. The Court allowed the submitting jurisdiction reasonable time to seek preclearance of the challenged plan or a different plan which would preclear. See also Berry v. Doles, 438 U.S. 190 (1978), where similar judicial restraint was exercised.

Three Judge District Courts, under adverse circumstances, should not be unnecessarily restricted in the exercise of judicial discretion. In Mahan v. Howell, 93 S.Ct. 979 (1973), the Supreme

Court held that the Three Judge District Court did not abuse its discretion by fashioning relief which under other circumstances might have been inappropriate (multi-member districts used by Three Judge District Court at variance with usual preference for single member districts.)

In Upham v. Seamon, 456 U.S. 37, at page 38 (1982), the Supreme Court emphasized that in fashioning a reapportionment plan, the courts should not preempt the legislative task nor intrude upon state policy any more than necessary. See White v. Weiser, 412 U.S. 783 at 794-795 (1973), and Whitcomb v. Chavis, 403 U.S. 124 (1971).

In discussion of the various rules of judicial deference, the Supreme Court stated at page 43 of Upham, supra, that "We have never said that the entry of an objection by the Attorney General to any part of a state plan grants a district court the authority to disregard aspects of the legislative plan not objected to by the Attorney General." See also Cook v. Luckett, 735 F.2d 912 at 921, (5th Cir. 1984), where it is stated "our decisions reveal a strong reluctance to undertake the drastic, if not staggering remedy of voiding a local election ...elections will not be set aside absent serious voting violations or aggravating factors, such as racial discrimination or fraudulent conduct." In

State of S.C. v. United States, supra, the Court held that dilatory motions may preclude injunctive relief where they are filed on the eve of primaries. In Perkins v. Matthews, 91 S.Ct. 431 at 447 (1971), it is stated "We should not forget that while it is easy for judges to order new elections, it will be neither easy nor inexpensive...to comply with such an order."

The facts of this case squarely present the "extreme circumstances" mentioned to in Clark v. Roemer, 111 S.Ct. 2096 (1991), and alluded to in earlier cases such as NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985), where the federal courts have allowed the subject governmental unit an opportunity to fashion a cure to the alleged ills of a voting rights violation rather than imposing injunctive relief as the presumptive remedy. See Georgia v. United States, 93 S.Ct. 1702, 1711 (1973); and Perkins v. Matthews, 91 S.Ct. 431, 441 (1973)

In Clark v. Roemer, supra, the Section 5 portion of a Voting Rights case was heard on appeal from a Three Judge District Court decision. There, "extreme circumstances" were discussed which might permit a Court to allow a non-precleared election plan to go into effect as an interim plan. The Court directly held that dilatory pleadings may

give rise to a different form of relief "ex post" elections that would not be appropriate in an "ex ante" situation. To overturn elections is an extreme remedy that should be considered only under the most egregious of circumstances.

Under the facts detailed above, Hale County had no real choice but to implement the proposed reapportionment plan, in light of the unconstitutional infirmities of the existing plan which were "too great to be justified by any state interest." See Terrazas v. Clements, 537 F.Supp. 514, 524 (1982), citing Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973); Kilgarlin v. Hill, 386 U.S. 120, 87 S.Ct. 820, 17 L.ed 2d 771 (1967); and Reynolds v. Sims, 377 U.S.533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Had the County chosen to use their old, malaportioned lines, it faced the very substantial likelihood of an injunctive challenge by Appellant and postponement of the election, or later vacation of those election results under a 14th Amendment or Section 2 claim. A similar "no-win" situation confronted the City of Houston in Campos v. City of Houston, 776 F. Supp. 304 (S.D. Tex. 1991), stay denied, Campos v. City of Houston, 112 S.Ct. 354 (U.S. 1991) and vacated, Campos v. City of Houston, 960 F.2d 26 (5th Cir. Tex. 1992), reh'g,

en banc, denied, Campos v. City of Houston, 1992 U.S. App. LEXIS 13949, op. withdrawn, substituted op., Campos v. City of Houston, 1992 U.S. App. LEXIS 17452 (5th Cir. 1992; United States v. City of Houston, et al, No. 91-3076, 91-3117 (S.D. Tex, Opinion August 21, 1992). In Campos, supra, however, suit was filed before the contested election, so there was a judicial vehicle in place for prompt remedial action by the federal court. Here, Appellant did not bring suit until six weeks after the disputed primary election.

Appellant argues that his suit is in fact timely, since it was filed well in advance of the General election in November. In Texas, the primary in March is the nominating process for the general election in November. At least one Texas Three Judge District Court has held that primaries are inseparable from the general election.

> "In common and universal usage the words "primary elections," with respect to offices filled by election from diverse geographically defined single member districts, mean elections in which will be chosen the party nominees for the next general election in the same district as that in which the primary election takes place. And this is clearly the accepted meaning of

> the term in the law and long settled practice in Texas...to order a redistricting plan fixing the boundaries of the several single member districts for the primaries only, and not for the next general election at which the officials would actually be selected, would be the height of futility and purposelessness." -- Terrazas v. Slagle, et al, A-91-CA-426, Western District of Texas, August 21, 1992 Order, See Page 65a, at 82a, State Officials Supplement to Appellants Jurisdictional Statement, and Supplemental Appendix, No. 91-1546, Slagle v. Terrazas, an appeal to United States Supreme Court.

In Campos v. City of Houston, 1992 WL 180267 (5th Cir. 7/31/92), the Court of Appeals clarified an earlier opinion, and directly held that under exigent circumstances, elections may be held under a plan to which the Attorney General has lodged an objection.

> "To hold, as the plaintiffs urge, that the district court lacked jurisdiction to adopt, as only an interim measure, the plan to which the Attorney General had initially objected creates unacceptable tensions with the consistently

recognized discretion of the district court to formulate and authorize the implementation of interim election plans in voting rights cases. Such a holding is further objectional because, illogically, it would make jurisdiction depend upon the relief ultimately ordered by the Court. Courts cannot operate under such post hoc rules. Second, although whether and why the Attorney General has objected to a certain plan are very relevant factors for the Section 2 Court to consider, alone they cannot preclude the court from using that plan as an interim measure. The Attorney General's objection or lack thereof does not necessarily indicate that the plan is constitutional or unconstitutional: it simply means that the plan has not met the necessary procedural requirements. Under appropriate circumstances, even an unconstitutional plan may be implemented on an interim basis."

Following remand, the three judge district court for the Southern District of Texas rendered an opinion on August 21, 1992, wherein the three judge district court found that the argument that new elections are the "presumptive remedy" is in

error, and that reliance upon Clark v. Roemer, 111 S.Ct. 2096 (1991) for this proposition was misplaced. The latest Campos opinion further confirms that the relief imposed by the Three Judge District Court in the Hale County case is appropriate under the exigent circumstances presented.

In Clark v. Roemer, supra, Appellants sought injunctive relief prior to the election. In the present case, although the predicament facing the County was apparent prior to the March 10 primary, Appellants did not seek to enjoin the election, but allowed it to go forward. Appellants failed to heed the warning explicit in Roemer, supra, on page 2101 "Appellants displayed no lack of diligence in challenging elections for the unprecleared seats"... or again on page 2102 "An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed."

Had Appellants herein sought the relief requested prior to the election of March 10, 1992, there is little doubt under existing law that the federal Court would have enjoined the election. However, by failing to exercise due diligence, Appellant's requested relief would create havoc with

the electoral processes in Hale County, and if anything, further diminish minority electoral potentials. For this reason, Appellant's requested relief in the form of injunction and vacation of election results should be denied. Appellant failed to assert alleged infirmities in the election scheme while there was a realistic chance to prevent any alleged harm. This Court should not enjoin elections held in the good faith belief that the boundaries were in conformity with established standards of constitutional and statutory law simply to satisfy dilatory Appellants.

The Supreme Court has repeatedly affirmed that under some circumstances, an interim plan that did not measure up to legal requirements, even constitutional requirements, might be allowed to serve as an interim plan in the exigent circumstances created by necessity. Any new elections at this late date would subject not only the individual candidates and taxpayers to unwarranted expense, but would create true chaos with voters. Practically speaking, there is every reason to believe that voter turnout for a special election would be minimal, thereby raising high potentials for minimizing minority impact upon election boundaries specifically drafted to address minority interests. The Northern District of Texas Three

Judge District Court properly fashioned relief that allowed Hale County to use the same lines for the general election as used in the primary election, but required that new, precleared lines be used in 1994 elections.

Plaintiff seeks to support his arguments by reference to other decisions in cases with similar facts in which various Three Judge Courts in the panhandle of Texas reached a determination that injunctive relief was appropriate. (Appendix P. 31, 38 and 42, Appellant's Petition)

These cases can be distinguished. In the Deaf Smith County case, (Appellant's Appendix p. 42), the parties agreed to special elections, and the Court merely ratified that agreement. In Castro County, (Appellant's Appendix p. 31, 33), the two precincts subject to 1992 elections were also the precincts with the highest minority concentrations, thereby rendering questions of preclearance and implications of voting rights vindication more pronounced as compared to the situation in the Hale County judgment, which held that injunctive relief would not vindicate voting rights concerns in 1992. The Cochran County (Appellant's Appendix P. 38) case is the most similar to the facts of Hale County in that in both cases the minority precinct would not come on for election until 1994. The rationale

between the two decisions admittedly is difficult to draw, although the Court in Cochran County appeared to discount any laches argument by the fact that Respondent's attorney, in oral argument, implied that the litigation was welcome, since it provided a vehicle for resolution of a clouded legal situation. However, instead of standing for the proposition urged by Appellant, the three distinguished cases serve to emphasize the need for a wide range of judicial discretion which is, and should be retained, in the Section 5 Courts when fashioning an appropriate remedy. Neither the Hale County nor the Cochran County judgments can be dispositively stated as the correct rule, but both can be equally supported as an appropriate remedy under similar facts within the sound discretion of the Section 5 Three Judge Court. Section 5 Courts should not be further limited in their ability to fashion appropriate relief as urged by Appellant. Only in situations which are clearly erroneous should a Three Judge Court judgment be set aside.

B. NO IRREPARABLE HARM WILL RESULT BY AFFIRMANCE OF THE COURT BELOW, APPELLANT BEING UNABLE TO SHOW THAT THE RELIEF SOUGHT VINDICATES, ESTABLISHES OR PROTECTS IMPORTANT VOTING RIGHTS.

Under Texas law, the 1992 elections nominate and elect a candidate to Commissioners Precincts 1 and 3, with Commissioners Precincts 2 and 4 being filled in the 1994 elections.

Despite the lack of preclearance, the 1992 primary election in Hale County nonetheless was more favorable to minorities than the existing, malaportioned boundaries in effect prior to the disputed reapportionment. Had Appellees strictly obeyed the mandate of the Voting Rights Act that no voting change be implemented until precleared, it would have been forced to proceed with elections under the "old" malaportioned boundaries which not only violated the 14th Amendments prohibitions against "one-person-one-vote" denials, but also did not provide minorities in Precinct 1 with an opportunity to elect a representative of choice. The "old" boundaries resulted in a precinct which was malaportioned (7.97% above the ideal precinct size) and which was composed of 54.36% Anglo voters.

Under the "old" boundaries, Precinct No. 2, which is not subject to elections until 1994, provided a combined minority population of 75.36%, although Precinct 2 was badly malaportioned (-12.36% below the ideal precinct size). Attached hereto as Appendix D is a demographic assessment of the boundaries in use prior to the 1991 reapportionment, incorporated herein by reference.

Under the uncleared boundaries, however, the 1992 elections provided minorities with a reasonable chance to elect a representative of choice. The reapportioned Commissioners Precinct No. 1, in 1992, provided for a precinct in which the combined minority percentage was 65.56%, and population imbalance was reduced to a relative deviation of 0.03% from the ideal. Attached hereto as Appendix E is a demographic assessment of the boundaries created by the objected to 1991 reapportionment, incorporated herein by reference.

Under the plan which was precleared by the Department of Justice on October 21, 1992, Commissioners Precinct No. 2, up for elections in 1994, will provide a combined minority percentage of 75.42%, with a relative deviation of 0.08% from the ideal. However, Commissioners Precinct No. 1, under the now precleared plan, provides a combined minority population of only 48.98%. It is extremely

unlikely that a minority candidate could be elected from the proposed Commissioners Precinct No. 1. Attached hereto as Appendix F is a demographic assessment of the boundaries created by the plan agreed to by the parties and precleared by the Department of Justice for use in 1994, incorporated herein by reference.

Therefore, if Appellant's relief were granted, the 1992 elections vacated, and new elections held under the agreed plan now precleared by the Department of Justice, the office of County Commissioner for Precinct 1 would be most likely filled by a candidate elected by the Anglo population of redrawn Precinct No. 1. The Three Judge District Court recognized this reality, and for that reason, among others, held that the most appropriate relief was to allow the use of the objected to plan for 1992 only, and to require the use of the proposed new reapportionment plan for 1994, since the election in that year would be most likely to elect a candidate of minority choice in any result. Under these facts, there can be no convincing argument made that the relief, if granted, would vindicate, establish or protect important voting rights. There is no showing of purposeful discrimination or other egregious conduct or harm which, under existing precedent,

would be required before a court would vacate or stay an election. U.S. v. Louisville Municipal, supra, Cook v. Luckett, supra. Appellant's case is based upon a much more technical violation of the voting rights act, and under a pragmatic analysis of the facts, one which would not vindicate, establish or protect rights that were not already address by the Appellees objected to plan. Such a marginal case should not be permitted to justify wholesale destruction of the elections conducted March 10, 1992 and November 3, 1992.

CONCLUSION

Based upon these pragmatic facts, and the law cited herein, the decision of the Three Judge District Court was appropriate. This Honorable Court should Affirm the judgment of the Court below, and Deny Appellant's Appeal.

ALLISON & ASSOCIATES
208 West 14th Street
Austin, Texas 78701
512/482-0701 Telephone
512/480-0902 Fax

(seal)

Office of the Secretary of State
John Hannah, Jr.
Secretary of State

MEMORANDUM

TO: Voter Registrars

FROM: Tom Harrison, Special Assistant for Elections

DATE: November 15, 1991

RE: Mass Mailout of Voter Registration Certificates

My office has received many calls regarding the mass mailout of voter registration certificates required by Section 14.001 of the Election Code. Since the redistricting plans for the State House of Representatives, the State Senate, the State Board of Education, and the U.S. Congressional seats have not been precleared, we have been asked if the mass mailout will be postponed.

The Secretary of State has no authority to delay the mailing of the certificates. The only legal way to delay the mailing would be to have a district judge enjoin you from mailing the certificates.

The Justice Department has agreed to respond to all state redistricting plans by November 22, 1991, so filing for office can begin on December 3, 1991. The Justice Department objected to the State House redistricting plans on November 12, 1991. The objection was based on lines drawn in El Paso,

Bexar, Cameron, and Dallas Counties. The State will offer a new House plan to the Federal Court in Washington.

Many of you are also waiting on preclearance for commissioners court precincts and justice of the peace precincts, as well as county election precincts. The Justice Department has made no commitments to the State regarding the dates for preclearance of these lines. They will probably take the 60 days allotted for preclearance.

I have attached a copy of a letter to Kathy Ferguson, Elections Administrator in Bexar County, which explains the Secretary's position on the mass mailout. Since the voting year begins on January, 1, 1992, and the return list is in effect for any election held on or after this date, it is important that you have this list available. Of course, the only way to have this list available is to mail the certificates in time to have them returned by the Post Office and complete the necessary computer work.

You must evaluate your own political situation and make the appropriate decision on when to mail your certificates and whether to use precinct lines that have not been precleared. Please call toll free 1-800-252-8683 if you have any questions.

(seal)

Office of the Secretary of State
John Hannah, Jr.
Secretary of State

October 18, 1991

Ms. Kathryn J. Ferguson
Bexar County Elections Administrator
203 West Nueva, Suite 301
San Antonio, Texas 78207-4515

Dear Ms. Ferguson:

This is in response to your letter dated October 5, 1991, which was faxed to our office. You asked how the current uncertainty concerning redistricting affects the mass mailout required by section 14.001 of the Texas Election Code.

Specifically, you asked whether the new certificates should be issued under the "old" lines or under the new, redistricted lines, and whether chapter 19 funds may be used to fund the mailout. The current uncertainty concerning redistricting is creating problems in many areas of elections. Unfortunately, the Election Code contains no provisions for extensions of time or alternate time schemes in the event a redistricting plan has not yet been precleared or is involved in litigation.

Presently, neither the senate, house, state

board of education or congressional plans have been precleared. Therefore, technically, these plans may not be implemented at this time. The most conservative answer is to conduct the mass mailout according to the old lines, since they are the only lines which are in effect. Once a redistricting plan becomes final, send notices of the changes in precincts to the affected voters. However, we realize the cost and double work this approach may create. Accordingly, our best advice to you is to conduct the mass mailout according to the new, proposed lines. If the redistricting plans are subsequently changed, you will need to send notification of the change to each affected voter. This second approach is likely to result in less cost and confusion to the county because the changes are likely to be fewer than the changes would be if the mass mailout were conducted pursuant to the old lines.

Of course, there is a certain amount of risk involved with taking this approach since it is not a procedure specifically authorized by the Election Code. However, considering the realities of the situation it appears to be the most practical course of action. We recommend, however, that you do not designate the senate, house, state board of education, or congressional districts on the new

cards since this may change and since this information is not required to appear on the card.

Concerning whether chapter 19 funds may be used to fund the mass mailout, the answer is clearly no. Tex. Elec. Code Ann. §19.004 (Vernon Supp. 1991). Chapter 19 Rules do not authorize "day to day" expenses of the voter registrar's office.

We hope you find this information helpful. If you have any questions or need additional information, please contact us.

Sincerely,

/s/ John Hannah, Jr.

John Hannah, Jr.

Secretary of State

(seal)

Office of the Secretary of State
John Hannah, Jr.
Secretary of State

MEMORANDUM

TO: County Clerks and Elections Administrators

FROM: Tom Harrison, Special Assistant for Elections

DATE: November 25, 1991

RE: Redistricting

The Justice Department has precleared the Congressional, Senatorial, and State Board of Education redistricting plans. The plans that have been precleared are referred to as plan numbers. They are as follows:

Congressional	Plan C657
State Board of Education	Plan E522
State Senate	Plan S560

The State Senate plan that was precleared is the court settlement in the Quiroz v. Richards lawsuit. The final judgment was granted on October 7, 1991.

The State House plan did not receive preclearance. The Justice Department stated they had problems with some of the districts drawn in the Valley and in Bexar, Dallas, and El Paso counties. A House committee is currently working on a new House plan. After all parties have agreed to the plan, it will be sent to a 3-judge panel in Washington for approval. I will let you know as soon as this plan has been precleared.

If the Commissioners Court drew precinct lines in accordance with the original Senate plan that passed the Legislature in May, it will be necessary for the Court to redraw election precincts so they do not violate Section 42.005 of the Election Code and obtain preclearance on the new precincts from the Justice Department.

I also want to remind you of the requirement in Section 42.035(d) that you send the Secretary of State a copy of the notice that was published in the newspaper concerning the new boundaries of county election precincts. A copy of this notice is to be filed not later than 20 days after it is published in the paper. If you failed to send it to our office within the time frame, be sure to put a copy in the mail as soon as possible.

Section 42.037 of the Election Code also requires you to file a county election precinct map

with our office not later than 120 days after the precincts have changed. You will need to file this map after the precincts have been precleared with the Justice Department.

If you have any other questions regarding redistricting, please feel free to contact my staff toll free 1-800-252-8683.

c: County Judges

ALLISON & ASSOCIATES

Attorneys at Law

Wahrenberger House

208 West 14th Street

Austin, Texas 78701

December 3, 1991

TO: COUNTY JUDGE AND VOTER REGISTRAR

FROM: ALLISON & ASSOCIATES

RE: DEADLINES UNDER ELECTION CODE

You should have recently received a letter from the Secretary of State regarding the obligation of your Voter Registrar to issue new voter registration certificates no later than December 6, 1991. (Art. 14.01, Texas Election Code, et seq.)

Additionally, the filing period deadline for individuals seeking office in the March Primary is January 2, 1992. (Article 172.023, Texas Election Code, et seq.)

Last night, the three judge panel in the U.S. District Court of Washington, D.C. refused to extend deadlines for the State of Texas elections and additionally refused to consider the revised House of Representative plan submitted by Attorney General Morales. This decision casts severe doubt upon the ability of the State to hold elections in

March. The resolution of this situation will not be known for some time. A portion of the requested relief was the extension of deadlines imposed by Texas law. The Court, in its opinion, refused to extend the deadlines at this time.

As result of the massive uncertainty that surround the political boundaries drawn by the Texas Legislature for the House of Representatives, the State Senate and the Texas Congressional delegation, all county redistricting plans are behind schedule, and as a result, candidates to not know under which lines to file, and likewise, the County Voter Registrar is unable to determine which lines apply to the required notification to voters.

At this time, political boundaries adopted by the Commissioners Court have not been precleared by the United States Department of Justice. Since the Voter Registrar must issue voter registration certificates no later than December 6, there is confusion and doubt as to which political boundaries should be used for the determination of election precincts by the Voter Registrar.

After careful consideration of the legal issues presented by this situation, we would outline the following options which are available:

1. DO NOTHING AT THIS TIME:

Until judicial opinions are rendered by the various state and federal courts having jurisdiction over several cases involving state redistricting and/or the Department of Justice preclearance, there is no way to project when elections will be held and what district lines will be utilized. For this reason, there is some support for no action until more clarity is available.

Unfortunately, two issues argue against this course of "non-action."

a. Failure to issue voter registration certificates would constitute a violation of State Election Code law, and constitute a potential basis for litigation against the County/Voter Registrar, including possible removal from office for purposeful disregard of requirements of office.

b. Practically speaking, we must assume until judicial orders to the contrary hold otherwise, that elections will be held on the second Tuesday in March. (Art. 41.007, Texas Election Code). The Voter Registrar must issue new voter registration certificates, obtain return of the non-forwardable postage, and purge voting lists in time for the March Primary. Even under the best of circumstances, if a March primary is held, the Voter Registrar should have no less than 60 days in which

to conduct voter notification, list purging, and issuance of final poll lists. This means that an extension of the notification deadline from December 6 should not extend beyond January 12, 1992 under any circumstances.

2. ISSUE CERTIFICATES UNDER EXISTING "OLD" LINES:

Existing political lines have been determined to no longer reflect numerical balance and/or minority representation standards required by the Constitution and laws of the United States. Although these lines are well known, and issuance of voter certificates under the old lines could be readily accomplished, there is every reason to believe that preclearance will be obtained within approximately 3 weeks time, thereby rendering the existing lines null and void, and requiring reissuance of voter certificates for the new lines. Not only will voters be confused by the receipt of two separate voter certificates, each possibly requiring the voter to cast his or her ballot in a different election precincts, but the duplication in effort and costs will be considerable.

We do not recommend that certificates be mailed under the old lines for the following reasons.

a. The existing lines are, without question, legally unsound. We have adopted a reapportionment plan which will alter these lines, although at this time we are unable to state when those changes will be precleared. Therefore, it does not seem prudent to issue notice under lines which we know are no longer legally valid.

b. The duplication of effort and costs to issue one set of certificates now, merely to comply with the election code requirement, and a second certificate when revised lines are precleared is deemed fiscally and administratively unwise.

c. Voter confusion will be compounded by duplicate certificates, thereby harming turnout and increasing confusion on election day.

3. ISSUE CERTIFICATES UNDER PROPOSED "NEW" LINES:

Although these lines have not been pre-cleared by the Department of Justice, we have every reason to believe that these lines will be approved. We therefore recommend that you issue voter certificates under the proposed lines for the following reasons:

a. Cost savings achieved by a single mailing will be considerable. In the event that the reapportionment plan is not pre-cleared in whole, we will in most cases be able to make relatively

minor changes to achieve compliance, thereby necessitating a limited second mailing to those voters affected by any requirement modification of the proposed lines.

b. Reduced confusion by the elimination of conflicting voter certificates.

c. We expect to obtain pre-clearance on the county reapportionment plan with two or three weeks. Therefore, the decision to issue certificates under the proposed plan is considered a "safe" procedure.

However, there are problems by this recommendation.

i. The proposed lines have not been precleared. Federal law preempts state law, and has the effect of causing any election held under such lines to be potentially subject to legal challenge. We firmly believe that the proposed lines will be pre-cleared eventually, and that the potential for legal challenge minimal, but you should be aware that if you elect to issue certificates under the proposed lines that you may be "implementing" a change in election policy, procedure or methods that has not been approved by the Department of Justice.

ii. We believe that issuance of voter certificates under the proposed lines is the best

option under very adverse circumstances. Should you elect to follow our recommendation, you would be entitled to assert a defense of reliance upon advice of legal counsel should you be legally challenged. A challenge might come from an interested party who believes that the proposed lines are discriminatory. Fortunately, in virtually every case, the old lines are more discriminatory than the proposed, so the ability of any interested party to show a discriminatory purpose or effect appears minimal.

Realistically, there is the potential of a legal challenge under any of the options, but we have attempted to suggest the most balanced course of recommended action taking all factors into consideration.

4. SEEK A JUDICIAL RESTRAINING ORDER DELAYING THE MAILING OF VOTER CERTIFICATES:

Should the Voter Registrar feel that he or she is simply unable to comply with the requirements of Article 14.001, Texas Election Code, a Temporary Restraining Order might be obtained from a local District Court judge.

A restraining order is good for 10 days, and may be extended in proper circumstances for additional time as the court deems appropriate.

However, for the reasons stated, until it is known when the state primary election will be held, we are unable to offer the court much guidance as to how long an extension will be necessary to accomplish the purpose of any delay. Therefore, we would have a difficult time obtaining any extension beyond the initial 10 days. While this might be sufficient in some cases, particularly if the situation involving state lines is clarified, in other cases 10 days might not be sufficient to obtain formal preclearance from Department of Justice for county boundary changes. Additionally, the logistical difficulty in obtaining a restraining order in all counties may be an impossible task at this late date.

5. FILING DEADLINES:

The County Chair for each political party, or the county judge for independent candidates, is the official authority empowered to receive applications for a place on the primary ballot. These officials are not, under state law, given any authority to accept multiple filings for the old versus new lines, and we do not believe that they can appropriately hold the application "unofficially" until a determination is made as to which lines prevail.

We are seeking a vehicle by which a statewide remedy might be had, but we are unable to assure you that such a remedy is available.

Most counties will receive preclearance before the expiration of the filing period on January 2, 1992. It is entirely possible that action by the state or federal courts now considering the redistricting cases will enter orders that will extend filing period and delay the March Primary. However, until these matters are resolved, any speculation on what might happen is just that, speculation.

Therefore, we suggest that if you have not been precleared by December 20, that a judicial order to extend the filing period be obtained in your own District Court. The procedure for such a temporary restraining order is similar to that described above in relation to the notification of voters.

CONCLUSION:

Please review these options and notify us as soon as possible of your decision. Should you determine that a Judicial Restraining Order is appropriate, we will need to discuss this issue with you since additional costs to the county will be incurred. These costs will include travel costs and additional legal fees since our contract does not provide for litigation expense.

Your earliest attention is appreciated. Please respond by FAX as soon as you determine what course of action is appropriate.

Sincerely,

/s/ Bob Bass
Bob Bass

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

RAFEL LOPEZ, Plaintiff	*	
vs.	*	
HALE COUNTY, TEXAS; BILL HOLLARS, County Judge, NINA JO MORRIS, HOMER ROBERSON, HENRY RIEFF and JAMES BELK, all in their official capacity as County Commissioners of HALE COUNTY, TEXAS, Defendants	*	CA No. 5-92-CV-0078-C Filed: July 17, 1992

STIPULATIONS

The parties have conferred and have agreed to the following stipulations:

1. That the Plaintiff, Rafel Lopez, is a Mexican American resident of Hale County, Texas. He has standing to bring this lawsuit.

2. That Hale County, Texas is a jurisdiction covered by Section 5 of the Voting Rights Act, 42 U.S.C. Sec. 1973(c), and, therefore, cannot enforce voting changes unless they have been precleared by the United States Attorney General or the United States District Court for the District of Columbia.

3. That the Hale County, Texas reapportionment plan adopted by the Commissioners Court of Hale County, Texas on September 11, 1991, is a voting change requiring preclearance pursuant to the Voting Rights Act.

4. That the Department of Justice interposed an objection to the Hale County, Texas reapportionment plan on April 10, 1992.

5. That the March 10, 1992 primary election for Hale County, Texas, was an election conducted pursuant to an unprecleared election change.

6. Filed in the papers of this cause as "Agreed Interim Plan" is a new reapportionment plan that has been agreed to by the parties. The Agreement calls for the submission of the new reapportionment Plan to the United States Department of Justice for preclearance in accordance with federal law.

7. That the 1992 elections should not be set aside at this time.

Dated: July 15, 1992

Respectfully submitted,

Bob Bass
ALLISON & ASSOCIATES
The Wahrenberger House
208 West 14th Street
Austin, Texas 78701
512/482-0701
512/480-0902 Fax

/s/ Bob Bass
Bob Bass SBN: 01880400
Attorneys for Defendants

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/s/ Rolando L. Rios
Rolando L. Rios by Permission
Attorney for Plaintiff

(seal)

U. S. Department of Justice

Civil Rights Division
Voting Section
P. O. Box 66128
Washington, D.C. 20035-6128

October 21, 1992

Robert T. Bass, Esq.
Allison & Associates
208 West 14th Street
Austin, Texas 78701

Dear Mr. Bass:

This refers to the 1992 redistricting plan for the commissioners court in Hale County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on August 28, 1992.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement

of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,
John R. Dunne
Assistant Attorney General
Civil Rights Division
By: /s/ Steven H. Rosenbaum
Steven H. Rosenbaum
Chief, Voting Section

APPENDIX D

COUNTY: HALE

Plan: MALAPORTIONED PLAN IN USE BEFORE REAPPORTIONMENT IN 1991

Population 34671.00

	IDEAL POP.	ACTUAL POP.	ABSOLUTE DEVIATION	RELATIVE DEVIATION
1	8667	9358	690	7.96%
2	8667	7596	-1071	12.36%
3	8667	8206	- 461	5.33%
4	8667	9511	843	9.74%

MAX DEVIAION: 22.10%

DEMOGRAPHICS:

	HISP.	ANGLO	BLACK	OTHER
1	3879	5087	310	82
VAP	2208	3860	191	51
2	5052	1872	622	50
VAP	2899	1449	405	36
3	2827	5004	292	83
VAP	1595	3955	206	61
4	2670	6218	542	81
VAP	1490	4734	313	54

BY PERCENTAGE

	HISP.	ANGLO	BLACK	OTHER
1	41.45	54.36	3.31	0.87
VAP	34.99	61.17	3.03	0.80
2	66.51	26.64	8.19	0.66
VAP	60.53	30.26	8.46	0.75
3	34.45	60.98	3.56	1.01
VAP	27.42	67.99	3.54	1.06
4	28.07	65.38	5.70	0.85
VAP	22.61	71.83	4.75	0.72

COUNTY TOTALS:

HISPANIC	14428	41.61%
ANGLO	18181	52.44%
BLACK	1766	5.09%
OTHER	296	0.85%

APPENDIX E

COUNTY: HALE

Plan: PLAN USED FOR 1992 PRIMARIES,
OBJECTED TO BY DEPARTMENT OF JUSTICE

Population 34671.00

	IDEAL POP.	ACTUAL POP.	ABSOLUTE DEVIATION	RELATIVE DEVIATION
1	8667	8670	2	0.03%
2	8667	8690	22	0.26%
3	8667	8656	-11	0.14%
4	8667	8655	-12	0.15%

MAX DEVIAION: 0.41%

DEMOGRAPHICS:

	HISP.	ANGLO	BLACK	OTHER
1	4904	2986	730	50
VAP	2800	2181	461	28
2	5032	3100	499	59
VAP	2862	2433	331	44
3	2628	5703	213	112
VAP	1477	4504	152	79
4	1864	6392	324	75
VAP	1053	4880	171	51

BY PERCENTAGE

	HISP.	ANGLO	BLACK	OTHER
1	56.56	34.44	8.42	0.58
VAP	51.19	39.87	8.43	0.51
2	57.91	35.67	5.74	0.68
VAP	50.48	42.91	5.84	0.87
3	30.36	65.88	2.46	1.30
VAP	23.78	72.50	2.45	1.27
4	21.54	73.85	3.74	0.67
VAP	17.11	79.29	2.78	0.60

COUNTY TOTALS:

HISPANIC	14428	41.61%
ANGLO	18181	52.44%
BLACK	1766	5.09%
OTHER	296	0.85%

APPENDIX F

COUNTY: HALE

Plan: AGREED PLAN PRECLEARED BY DEPARTMENT OF JUSTICE FOR USE IN 1994 AND BEYOND

Population 34671.00

	IDEAL POP.	ACTUAL POP.	ABSOLUTE DEVIATION	RELATIVE DEVIATION
1	8667	8609	-58	0.68%
2	8667	8661	- 6	0.08%
3	8667	8656	-80	0.93%
4	8667	8655	145	1.68%

MAX DEVIAION: 2.61%

DEMOGRAPHICS:

	HISP.	ANGLO	BLACK	OTHER
1	3900	4392	247	70
VAP	2172	3304	159	40
2	5683	2129	800	49
VAP	3303	1660	524	37
3	2306	6016	189	76
VAP	1307	4724	132	56
4	2539	5643	530	101
VAP	1410	4309	300	69

BY PERCENTAGE

	HISP.	ANGLO	BLACK	OTHER
1	45.30	51.02	2.87	0.81
VAP	38.27	58.22	2.80	0.70
2	65.62	24.58	9.24	0.56
VAP	59.79	30.05	9.49	0.67
3	26.85	70.06	2.20	0.88
VAP	21.02	75.96	2.12	0.90
4	28.81	64.03	6.01	0.86
VAP	23.16	70.78	4.93	0.71

COUNTY TOTALS:

HISPANIC	14428	41.61%
ANGLO	18181	52.44%
BLACK	1766	5.09%
OTHER	296	0.85%